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Horizon Litigation: facts of the case, including relevant background, for BEIS Permanent Secretary Alex Chisholm

Background

1. Transactions at the post office counter are undertaken on the Horizon system, which is used by c50,000 people per day across the network, and which POL estimates has been used by around half a million employees, agents or employees of agents since it was introduced in 1999.
2. In 2012 a small number of (mostly former) subpostmasters, under the banner of the “Justice for Subpostmasters Alliance” (JFSA) and with support from some MPs led by then-MP (now Lord) James Arbuthnot, claimed POL’s Horizon IT system had caused losses (shortfalls in physical cash against cash holdings recorded on Horizon) which they had had to make good. In some cases they had been prosecuted for these losses (usually for false accounting, theft or both) while, in other cases, they claim that it led to bankruptcy or consequential, personal losses ranging from divorce to suicide. Most of these cases, at least initially, related to issues prior to Post Office’s separation from Royal Mail in 2012.
3. POL and the JFSA jointly commissioned an independent firm of forensic accountants, Second Sight, to examine the system for evidence of flaws which could cause accounting discrepancies. Second Sight’s initial report in June 2013 found no evidence of systemic flaws in Horizon that could cause the issues raised. A final report in 2015 did find that in some cases POL could have provided more training and support to subpostmasters. POL has since made changes with a view to addressing this, although the Court’s view as to what is sufficient under POL’s contractual relationship with subpostmasters is yet to be tested.
4. A mediation scheme was established in 2013, with JFSA involvement, to work through 136 cases, in an effort to resolve the individual disputes. This included specific forensic investigation into those cases. As before, no evidence of systemic flaws in the system was found; rather the investigations (by Second Sight and Post Office) found that the main reason for losses in the majority of cases was “errors made at the counter” by the subpostmaster or their staff. To date, UKGI and BEIS have not been privy to the details of individual cases, as POL considers these to be confidential between POL and the individuals. However, we understand from POL that the cases considered in the mediation scheme have ranged from, at one end, examples where POL could and should have provided more support to the subpostmaster in preventing errors being made, to the other end, where there has been clear incompetence, fraud or dishonesty from the subpostmaster or their staff.
5. The mediation scheme ultimately proved unsatisfactory to the JFSA and was closed in early 2015. Whilst 22 subpostmasters were able to settle their disagreements with POL, and others were able to progress their issues with POL, the JFSA was not satisfied with the outcome and continued to campaign for a better resolution. Many JFSA members were seeking substantial sums in compensation, which was not forthcoming, and indeed some were seeking to overturn convictions for false accounting, fraud or theft (about 40 cases), which the

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mediation scheme could never resolve. According to POL, it is worth noting that none of those convicted of an offence have appealed their conviction or their sentence. Since the mediation scheme launched, around 20 individuals with convictions have referred cases to the Criminal Cases Review Commission (CCRC), whose review process has now been going on for around two years. BEIS/UKGI have disclosed information to the CCRC, as we are required to do by law, for their investigations. POL do not know when the CCRC will reach a decision in any of the cases, the CCRC may decide to await the outcome of the civil litigation beforehand.

6. There has been significant lobbying by the JFSA of Parliament and through the media, although this has not altered POL's position which is that these are individual disputes best settled separately between each party rather than having some common thread.

Nature of the Complaint

7. In recent years, the focus of the complaints by subpostmasters has shifted from issues with the IT system, to the alleged "unfairness" of the contract between POL and subpostmasters. Subpostmasters are agents of POL, not employees, and according to the well-established law of agency, the agent (subpostmaster) has a fiduciary duty to account to the principal (POL). This principle is reflected in the contract between POL and subpostmasters, which requires subpostmasters to make good any losses of third party monies under their care (e.g. benefits, cash paid into bank accounts etc). This means that where there are discrepancies between cash in the safe/till compared to the cash stated by the system, and no clear reason can be identified, the subpostmaster is liable for the missing money. Where there is evidence of theft or false accounting, POL can (and has) sought to bring a prosecution against the individual responsible, often the subpostmaster but occasionally a member of their staff.
8. The litigants are claiming that the contract did not reflect the true nature of the POL–subpostmaster relationship. While they accept that there was a principal–agent relationship in force, they nevertheless maintain that the relationship was akin to an employment relationship and, as such, the fiduciary duty to account to the principal did not apply thereby shifting the burden of responsibility for explaining accounting losses from subpostmasters to POL. Linked to this, they are also seeking to establish that the contract implies other terms that further shift the burden of responsibility onto POL – for example, that POL had an obligation to provide sufficient training to Subpostmasters to help them avoid accounting errors.
9. There are now around 550 parties to the case – we understand from POL that there is limited commonality in the complaints and claims being put forward. Of these cases, we understand that some are likely to be dismissed by the court as they fall outside its remit: about 100 relate to criminal cases and about half fall outside the statute of limitations period, while some subpostmasters have already agreed to waive their rights to bringing further claims by leaving the Post Office network under its Network Transformation compensation scheme.

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Measures taken by POL

10. POL considers that it has undertaken a significant amount of work ever since the claims were first raised to establish the nature of the issues raised. In addition to the mediation scheme, which was entirely funded by POL, and paying for the Second Sight forensic investigation, POL has taken the following steps:
- POL appointed Deloitte in 2013 to look at the Horizon system to establish its veracity. Whilst this was a limited study due to the passage of time, according to POL no issues were found.
 - At Baroness Neville-Rolfe's request, when she was the responsible BIS Minister, the then incoming POL Chair Tim Parker commissioned a new QC to investigate the matter when he joined POL in October 2015. The initial findings of this investigation satisfied the Chair that POL had taken the appropriate action at each stage. With the announcement of the group litigation in November 2015, the Chair decided following legal advice not to conclude the investigation as it could have impacted the Court's consideration of the claims.
 - POL have spent many millions of pounds investigating individual cases and have not identified any systemic issues which could have caused these problems (rather finding a range of issues as outlined above).

The Litigation Process

11. Post Office have engaged two QCs and are being advised by Bond Dickinson.
12. At a case management meeting held in October last year, it was agreed that the first hearing ("Common Issues Trial") would be held on 5 November 2018. Both sides will each select 6 test cases, with 6 of those 12 being tested in the court, to establish what points of law should be tested for the group of litigants as a whole, particularly the question of the proper construct of the contract and what terms are implied in it. The "Horizon trial" will then be held in March 2019 to look in detail at the specific issues claimed in relation to Horizon across the wider set of cases within the parameters set by the first trial.
13. In the meantime, both sides are seeking to establish the facts of the cases. The court recently opined that the JFSA's solicitors, Freeths, could make limited and relevant further requests for POL to disclose information, and POL is seeking more information on the extent of the claims, which have not been disclosed in any great detail.
14. Until the November hearing, which will set the parameters of the case, it is hard for POL to determine with a reasonable degree of accuracy the potential level of liabilities that the business is exposed to. Although few details have been provided to them by Freeths, POL knows from its experience of the mediation scheme and other bilateral discussions with subpostmasters before this case started, that the high-water mark for the quantum of the claims against them extends to c£250m. However, POL knows from the mediation scheme that these amounts include claims for loss of future earnings, school fees, reputational damage etc, which POL and its legal advisers do not consider it would be liable for even if the court found against them.

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15. It is worth noting that POL's auditors EY have agreed with POL's accounting treatment of this, which is not to create a provision given the lack of claim details put forward to date.
16. Until claims can be properly quantified following the first case in November, it is difficult for the business to consider the matter of settling the case out of court. However, the business's position is that it would nevertheless be wrong to offer any settlement on the basis that they consider they have a strong case, and any settlement exposes them to the risk of further action from additional subpostmasters.
17. POL's next priority is to seek security of costs, such that they have assurance that should they win the case they can seek to recover costs from the litigants. The claimants action is being funded by a private equity firm who specialise in legal claims (who will take the first c£20million of any award should the litigants win), but POL does not currently have certainty that this firm would meet POL's costs should POL win the case. This will be considered at a "Security of Costs Hearing" in late May and could lead to the case being dropped if security of costs is insufficient. Whilst this would be a good result for POL legally speaking, the JFSA would likely re-engage their public campaign claiming that they had been denied the opportunity for their case to be heard in court, with the issue possibly returning to parliamentary debates and scrutiny.

Impact on POL

18. In addition to the significant cost and level of management attention this dispute has entailed for POL over the last few years, other implications which POL has identified include:
 - POL has been less rigorous in its enforcement of its contract when money goes missing. With a network of over 11500 branches it is inevitable that some individuals working in the network, including subpostmasters, are less honest or competent than the vast majority. POL has still suspended or terminated the contracts of subpostmasters where they have been found to be at fault, but has been less rigorous in its recovery of funds, focussing instead on trying to spot discrepancies as they emerge and limit their size. POL is seeing the effect of this, in that there appears to be an uptick in issues of fraud (and of those accused of fraud joining the litigation proceedings, making recovery harder).
 - POL has had to take greater care in the roll-out of its new Horizon equipment than would otherwise be the case, making a complex implementation all the more complicated.
 - Given the shift in the claimant's argument from the IT system to the "unfairness" of the contract, they may also seek to link into the broader debate about lack of employment or consumer protections for contractors. POL itself periodically faces separate cases whereby subpostmasters claim that their status is that of an employee or a worker rather than an agent – POL was notified on 25 April

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that 120 subpostmasters have launched such a claim - and these could further complicate the Horizon litigation (or vice versa). Given that the majority of post office branches are run by self-employed subpostmasters on an agency basis, an adverse ruling could force POL to reformulate contracts for new operators and renegotiate existing contracts, and, by extension, potentially impact more broadly on its operating model and commercial sustainability.

Ongoing Work and Next Steps

19. POL has established a board sub-committee to consider the issues as they arise on behalf of the board. The schedule for both the sub-committee meetings and board meetings has been synchronised to the Group Litigation Timetable so that POL's QCs and legal advisors can provide regular updates at critical junctures in the trial process.